

**A Bank Perusahaan Kecil & Sederhana (M) Bhd v Sha Thiam
Fook (receivers and managers of Delta Odyssey Sdn
Bhd)(receivers and managers appointed)**

B HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-1981-11 OF
2011
LEE SWEE SENG JC
19 NOVEMBER 2012

C *Land Law — Sale and purchase of property — Proceeds of sale of property —
Appointment of receiver and manager — Proceeds realised with various deductions
and disbursements — Whether deductions and disbursements reasonable —
Application of accounts inquiry into proceeds realised — Whether defendant
obliged to pay over plaintiff amount so held to be outstanding — Companies Act
1965 s 192(2)*

Pursuant to a debenture created in favour of the plaintiff by Delta Odyssey Sdn
Bhd ('Delta Odyssey') for a facility of RM18m, the plaintiff appointed the
E defendant as the receiver and manager ('R & M') of Delta Odyssey. The R &
M put the property up for auction and after the property was sold, the proceeds
were realised. Various deductions were made to the fees and disbursements
incurred from the proceeds of sale but the plaintiff said that it was not aware of
it except for some payments that were made from time to time by the R & M
F to the plaintiff. R&M had charged and deducted at source, his fees of
RM134,616 based on 5% of the sale price of 28 units of condominium. In the
present action, the plaintiff sought an accounts inquiry into the proceeds
realised from the sale of the property and the sums that ought to have been paid
to it from the R&M after the deduction of the fees and expenses incurred. The
G plaintiff further asked for an order that the defendant do pay over the plaintiff
the amount so held to be outstanding from the defendant to the plaintiff under
s 192(2) of the Companies Act 1965. Conversely, the defendant
counterclaimed for amounts said to be due and owing to him. The issues that
arose for the court's determination were whether the commission of
H RM319,040 and RM17,500 charged by the R & M of the 27 units of
condominium and one unit of penthouse for a purchase price of RM6,380,800
and RM350,000 respectively in the Gurney Heights Condominium was
reasonable; whether the legal fees and disbursement of RM9,071,281 for
acting for the R & M validly incurred; and whether the legal fees of RM41,000
I for the rendering of legal opinion was reasonable in the circumstances of the
case and if not, the amount that should be paid after taxation by the court.

Held, allowing the claim:

- (1) There was no basis for comparison with past transactions because those

transactions were for the sale of vehicles, equipment and machinery and not for properties such as a block of condominium. At any rate, there was no agreement for a fee based on 5% of the sale proceeds. The plaintiff had stated on previous occasions that it had paid receivers and managers based on 2% of the sale proceeds (see para 16).

- (2) In absence of an agreement on fees, where professional fees for sale of properties were concerned, it would be reasonable to base it on what a real estate agent would be entitled to if the same exercise would be conducted by a real estate agent leading to a successful sale by tender by public auction. Bearing in mind the skills involved, time spent and the three tenders that had to be conducted and the exposure of liability, the defendant's fees were allowed based on the same maximum scale as a real estate agent of 3% of the sale price amounting to RM6,730,800 which gave RM201,924. Service tax of 5% equivalent to RM10,096.20 was also allowed (see paras 17 & 20).
- (3) As the exercise of taxation was meant to resolve fully and finally, the issue of outstanding fees and payments between the parties, justice would be served by deducting the sum of RM12,258 from the sum of RM90,712.81 being the legal fees and disbursements paid by the defendant for the sale and purchase and deed of receipt and reassignment ('DRR') of the 27 units of condominium yielding the sum of RM78,454.81. The amount of RM12,258 being the amount overpaid was to be refunded by the defendant to the plaintiff and would be taken into consideration in the overall calculation as to the amount outstanding from the defendant to the plaintiff (see para 29).
- (4) The defendant was ordered to pay to the plaintiff, the sum of RM88,112.85 in full and final settlement of all outstanding accounts with respect to his appointment by the plaintiff as the R & M of Delta Odyssey (see para 41).

[Bahasa Malaysia summary]

Berikutan debentur yang dibentuk memihak kepada plaintif oleh Delta Odyssey Sdn Bhd ('Delta Odyssey') bagi kemudahan sebanyak RM18 juta, plaintif melantik defendan sebagai penerima dan pengurus ('R & M') Delta Odyssey. R & M meletakkan hartanah tersebut kepada lelongan dan selepas hartanah tersebut dijual, keuntungan direalisasikan. Pelbagai pemotongan dibuat kepada fi dan pembayaran ditanggung daripada keuntungan jualan tetapi plaintif menyatakan ia tidak menyedarinya kecuali untuk beberapa bayaran yang dibuat dari masa ke masa oleh R & M kepada plaintif. R&M telah mengenakan caj dan dipotong daripada sumbernya, fi nya sebanyak RM134,616 berdasarkan ke atas 5% daripada harga jualan 28 unit pangsapuri. Dalam tindakan ini, plaintif memohon penyiasatan akaun-akaun ke dalam keuntungan yang direalisasi daripada jualan hartanah dan jumlah yang patut

- A dibayar kepadanya daripada R & M selepas pemotongan fi dan perbelanjaan yang ditanggung. Plaintiff selanjutnya memohon untuk perintah bahawa defendan membayar kepada plaintiff jumlah yang dipegang sebagai jumlah kena bayar daripada defendan kepada plaintiff di bawah s 192(2) Akta Syarikat 1965. Sebaliknya, defendan menuntut balas untuk jumlah yang kena dibayar
- B kepadanya. Isu-isu yang berbangkit untuk penentuan mahkamah adalah sama ada komisen RM319,040 dan RM17,500 yang dicaj oleh R & M terhadap 27 unit pangsapuri dan satu unit penthouse untuk harga belian masing-masing sebanyak RM6,380,800 dan RM350,000 di Gurney Heights Condominium adalah munasabah; sama ada fi undang-undang dan pembayaran sebanyak
- C RM9,071,281 untuk bertindak bagi R & M secara sah ditanggung; dan sama ada fi undang-undang sebanyak RM41,000 untuk memberikan pandangan undang-undang adalah munasabah dalam keadaan kes dan jika tidak, jumlah patut dibayar selepas dikenakan cukai oleh mahkamah.
- D **Diputuskan**, membenarkan tuntutan:
- (1) Tiada asas untuk perbandingan dengan transaksi terdahulu kerana transaksi-transaksi tersebut adalah untuk jualan kenderaan, kelengkapan dan mesin dan bukan untuk hartanah seperti blok pangsapuri. Walau bagaimanapun, tiada perjanjian untuk fi berdasarkan ke atas 5% daripada keuntungan jualan. Plaintiff telah menyatakan pada masa sebelumnya bahawa ia membayar penerima dan pengurus berdasarkan 2% daripada keuntungan jualan (lihat perenggan 16).
- E
- F (2) Dalam ketiadaan perjanjian fi, di mana berkenaan fi profesional untuk jualan hartanah, adalah munasabah untuk berdasarkannya ke atas apa yang ejen hartanah berhak jika tindakan yang sama dilakukan oleh ejen hartanah membawa kepada jualan yang berjaya dengan tender melalui lelongan awam. Mengambil kira skil yang terlibat, masa yang digunakan dan tiga tender yang terpaksa dilakukan dan pendedahan kepada liabiliti, fi defendan dibenarkan berdasarkan atas skala maksimum yang sama sebagai ejen hartanah sebanyak 3% daripada harga jualan berjumlah RM6,730,800 yang memberi kepada RM201,924. Cukai khidmat sebanyak 5% bersamaan kepada RM10,096.20 dibenarkan (lihat perenggan 17 & 20).
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- H
- I (3) Memandangkan pelaksanaan cukai bermaksud untuk menyelesaikan kesemua dan akhirnya isu fi yang kena dibayar dan bayaran-bayaran di antara pihak-pihak, keadilan akan dilaksanakan dengan menolak jumlah RM12,258 daripada RM90,712.81 sebagai fi undang-undang dan bayaran-bayaran dibayar oleh defendan untuk jualan dan belian dan surat ikatan penerimaan dan penugasan semula ('DRR') daripada 27 unit pangsapuri menghasilkan jumlah RM78,454.81. Jumlah sebanyak RM12,258 sebagai jumlah yang terlebih bayar dipulangkan semula oleh

defendan kepada plaintiff dan akan diambil kira dalam kesemua pengiraan jumlah yang kena dibayar oleh defendan kepada plaintiff (lihat perenggan 29).

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- (4) Defendan diperintahkan untuk membayar kepada plaintiff, jumlah sebanyak RM88,112.85 sepenuhnya dan penyelesaian muktamad kepada kesemua akaun-akaun yang kena dibayar berkaitan pelantikan plaintiff sebagai R & M Delta Odyssey (lihat perenggan 41).]

B

Legislation referred to

Companies Act 1965 ss 190(1), 192(2)

Legal Profession Act 1976 s 126

Rules of the High Court 1980 O 33 r 3

Solicitors' Remuneration Order 2005 First Schedule, Fourth Schedule

Valuers, Appraisers and Estate Agents Rules 1986 r 48, Seventh Schedule

C

Nor Shahadah bt Saari (Shukor Baljit & Partners) for the plaintiff.

Goik Kenwayne (Dennis Nik & Wong) for the defendant.

D

Lee Swee Seng JC:

PROLOGUE

E

[1] The plaintiff appointed the defendant as the receiver and manager ('R & M') of Delta Odyssey Sdn Bhd. The appointment was by letter dated 14 August 2007. The appointment was pursuant to a debenture created in favour of the plaintiff by Delta Odyssey Sdn Bhd ('Delta Odyssey') for a facility of RM18m. The substantial assets that the R & M took possession of on 4 September 2007 was a 30 units condominium called Gurney Heights Condominium ('the property').

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[2] Like most relationships between a client and its professional adviser, problems would rise when it comes to billing of the professional for work done and services rendered especially when there has been no prior agreement on fees. The problem is compounded further by a lack of communication between the professional and his client especially where fees is concerned. This was what happened here.

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THE PROBLEM

[3] The R & M proceeded to put the property up for auction. After several unsuccessful auctions, the property was finally sold. The proceeds from the sale of the property were realised. Various deductions were made for the fees and disbursements incurred from the proceeds of sale but the plaintiff said it was not aware of it save for some payments that were from time to time paid by the

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- A R & M to the plaintiff. The plaintiff was general unhappy with the lack of communication from the R & M with respect to the final accounts as to what had been realised from the proceeds of sale of the property and the deductions for the remuneration and fees of the R & M and that incurred by other professionals engaged by the R & M to represent him in the sale of the property.
- B Indeed there should be no problem for the R & M to furnish the plaintiff with a copy of the detailed account lodged every six months with the registrar of companies showing his receipts and payments every six months as provided for under s 190(1) of the Companies Act 1965.

- C [4] It transpired that the R & M had charged and deducted at source his fees of RM134,616 based on 5% of the sale price of 28 units of the condominium. Further sums of RM90,712.81 and RM41,000 had been charged by a legal firm and paid by the R & M for the preparation of the sale and purchase agreement for the 28 units of condominium sold and for the legal opinion rendered to the R & M respectively. These too had been deducted at source from the proceeds of the sale of the property.
- D

- E [5] The plaintiff had brought this action seeking an accounts inquiry into the proceeds realised from the sale of the property and the sums that ought to have been paid to it from the R & M after deduction of the fees and expenses incurred. It had asked for an order that the defendant do pay over to the plaintiff the amount so held to be outstanding from the defendant to the plaintiff under s 192(2) of the Companies Act 1965. Conversely the defendant counterclaimed for amounts said to be due and owing to him his fees and that of his agent, the solicitors engaged to render his professional service in the transactions and the legal opinion rendered.
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THE PRAYERS

- G [6] During the various case management sessions the court had informed the parties that the various claims of the plaintiff could be substantially narrowed down if the defendant could disclose what was it that he had realised as the R & M of Delta Odyssey and what are the fees that he had deducted at source. We would then be able to know how much is outstanding from who to whom.
- H

- I [7] In short, all that was needed of the defendant was to open up the books and all that would be necessary would be for this court to determine the items of charges that the parties could not agree for which the defendant as R & M had made deduction at source.

[8] That suggestion found favour with the parties and at the end of the day the parties agreed that there was no need for a trial where witnesses had to be called. Both parties agreed that this court should determine the following issues

under O 33 r 3 of the Rules of the High Court 1980 ('RHC') based on the documents annexed as exhibits to the affidavits filed which documents are not in dispute:

- (a) whether the commission of RM319,040 and RM17,500 charged by the R & M for the sale of the 27 units of condominium and one unit of penthouse for a purchase price of RM6,380,800 and RM350,000 respectively in the Gurney Heights Condominium is reasonable in the circumstances of the case being based on 5% of the sale price and if not, the amount that should be paid after taxation by the court;
- (b) whether the legal fees and disbursements of Messrs Aziz Zakaria Shaiful & Wan ('AZSW') for RM90,712,81 for acting for the R & M in the preparation of the sale and purchase agreement and for deed of receipt and reassignment for the 28 units of condominium are validly incurred as there are billings for receipt and reassignment of the units to the plaintiff direct from the same solicitors and
- (c) whether the legal fees of AZSW for RM41,000 for the rendering of legal opinion is reasonable in the circumstances of the case and if not, the amount that should be paid after taxation by the court.

[9] An application for determination of the above issues as fully and finally disposing of the plaintiffs claims and the defendant's counterclaim under O 33 r 3 of the RHC was duly filed by the plaintiff as encl 11. Parties filed their respective affidavits.

[10] All the other prayers of the plaintiff including the defendant's counterclaim were withdrawn and so struck out by the court.

THE PRINCIPLES

[11] Parties are agreed that the debenture under which the R & M was appointed as well as the letter of appointment of the R & M, are silent on the professional fees that he may charge for work done with respect to and in connection with the sale of the property or for that matter fees and disbursements that had to be paid to solicitors and valuers appointed by the R & M for their professional services rendered. They further agreed that the defendant is entitled to a reasonable remuneration pursuant to section 9.05 of the debenture.

[12] The R & M had been appointed for an initial period of six months from the date of the letter of appointment dated 14 August 2007 till 13 February 2008 for the monthly remuneration of RM7,000 per month.

A [13] I note the following observation in *Corporate Receivership: The Law and Practice in Malaysia and Singapore* by the learned authors Suhendran bin Abdullah, Lim Tian Huat and Edwin Chew, Butterworths, 1997 at p 331:

B In the absence of specific provisions, it is normally left to the debenture holder to reach an agreement with the receiver concerning the latter's remuneration. Some debentures will contain a provision empowering the debenture holder 'either at the time of the appointment or at any time subsequently and from time to time to fix the remuneration of any receiver so appointed. The most common basis of remuneration adopted in this region is a fixed monthly professional fee. It is not atypical for the receiver's fees for the first few months of the administration to be agreed at a rate higher than the fees for subsequent months, reflecting the greater volume of work that is normally required following the commencement of a receivership. It should be noted that an express agreement for remuneration will prevent the receiver from making a higher claim founded on a quantum meruit.

D [14] Much headache would have been avoided if the simple advice of the learned authors had been followed by the parties and this suit would have been unnecessary.

E *Issue 1: Whether the fees of the R & M based on 5% of the sale price of the property is reasonable in the circumstances of the case*

F [15] The defendant had in his invoice dated 31 July 2009 billed the sum of RM319,040 being 5% of RM6,380,000 being his fees based on the proceeds realised from the sale of 27 units of the property. There was another billing for RM17,500 based on 5% of RM350,000 being the sale price of one unit of the penthouse in the condominium. The defendant sought to justify the 5% fees based on the fact that in his previous dealings, appointments and arrangements with the plaintiff, he had charged between 5% to 15% of the sale proceeds of the sale of assets as his professional fees. His learned counsel, Mr Goik Kenwayne, argued that his client's current charge based on 5% was a conservative and reasonable charge.

H [16] I agree with learned counsel for the plaintiff, Miss Shahadah bt Saari, that there is no basis for such a comparison with past transactions because those transactions were for the sale of vehicles, equipment and machinery and not for properties such as a block of condominium. At any rate there was no agreement for a fee based on 5% of the sale proceeds. Her client had stated that on previous occasions the plaintiff had paid receivers and managers based on 2% of the sale proceeds. She thus argued that 2% of the sale proceeds would be reasonable in the circumstances.

I [17] In the absence of an agreement on fees, I think where professional fees for sale of properties are concerned, it would be reasonable to base it on what a

real estate agent would be entitled to if the same exercise would be conducted by a real estate agent leading to a successful sale by tender by public auction. The work whether undertaken by an R & M or a real estate agent would be more or less the same work with respect to securing a purchaser for his client. The relevant clauses would be stated in the tender documents to be made available and the relevant advertisements taken out. The tenders that came in would be processed and generally sale would be to the highest bidder. Under the r 48 of the Valuers, Appraisers and Estate Agents Rules 1986 it is provided as follows where scale of fees are concerned:

48 Scale of fees

(1) The scale of fees to be charged by the registered valuers, appraisers and estate agents for professional advice and services rendered shall not be more than those prescribed in the Seventh Schedule.

(2) The values specified in the Seventh Schedule shall be deemed to be the total amount undertaken under one specific instruction.

[18] The Seventh Schedule further provides under 'C Estate Agency' the following:

1. Sale or Purchase

(a) Land and Buildings

Maximum fee of 3%

(b) Chattels including Plant and Machinery

10% of the proceeds

...

4. Additional Claims

In addition to the fees stated in item 1 to 3, claims may be made for

(a) the cost of printing, plans, copies of documents, lithography, travelling (only where the distance between the estate agent's office and the property is more than 40km) and other expenses actually incurred;

(b) the cost of media advertisements, signboards, brochures and other professional material.

Note:

The above additional claims may not be incurred by the registered estate agent without the prior concurrence of the client.

[19] Here the defendant had charged for all disbursements and expenses incurred including printing, advertisements and travelling and the plaintiff is

- A not disputing that. The court takes into consideration that the sale of the 27 units of condominium was successful after the first tender conducted on 25 January 2008 and there was only one purchaser who tendered en-block for the 27 units. The second tender was conducted on 7 April 2008 and 10 April 2008 and out of the three remaining units, only one was successfully sold. The third tender was conducted on 15 January 2010 but there was no bidder.

- [20] In the circumstances, bearing in mind the skills involved, time spent and the three tenders that had to be conducted and the exposure to liability, I had allowed the defendant's fees based on the same maximum scale as a real estate agent of 3% of the sale price amounting to RM6,730,800 which gives RM201,924. I also allowed service tax (5%) of RM10,096.20.

- Issue 2: Whether the legal fees and disbursements of Messrs Aziz Zakaria Shaiful & Wan ('AZSW') for RM90,712,81 for acting for the R & M in the preparation of the sale and purchase agreement and for deed of receipt and reassignment for the 28 units of condominium is validly incurred as there are billings for receipt and reassignment of the units to the plaintiff direct from the same solicitors*

- [21] No one is disputing the powers of the defendant as R & M to appoint solicitors to attend to the sale and purchase transactions as well as the deed of receipt and reassignment of the units. However the fees incurred has to be validly incurred and not the result of what is double-billing.

- [22] Here there were earlier billings all dated 14 March 2008 from the solicitors AZSW to the defendant for ostensibly the 'sale and purchase agreement' with the purchase price of the unit and the property Parcel stated on the caption of the various bills. A typical bill at p 246 of encl 12 is reproduced below:

- AZIZ ZAKARIA SHAIFUL & WAN
Advocates and Solicitors
No. 37, 1st Floor, Jalan Medan Tuanku
50300 Kuala Lumpur
Tel: 03-26944500 Fax: 03-26980604

Invoice No 47000

- Our Ref: AZSW/005/08/20479/S/SPS/rs
Date: 14/3/2008
MESSRS. DELTA ODYSSEY SDN. BHD. (Receiver & Manager Appointed)
c/o Messrs. Sha, Tan & Co.

Box #289, Lot 4.122-4.125

A

4th Floor, Wisma Central

Jalan Ampang, 50450 Kuala Lumpur

Dear Sirs:

B

RE: SALE AND PURCHASE AGREEMENT

Purchase Price: RM246,560-00

Property Parcel No. XXXX, Lanai Gurney Heights Condominium.

C

TO OUR PROFESSIONAL CHARGES for services rendered including taking down instructions, liaising etc., drafting preparing, attesting and attending to the stamping, registration filing and other matter not specifically mentioned herein of the following matters:

D

LEGAL FEES	RM	RM
(a) Sale and Purchase Agreement	2,175.92	
(b) deed of receipt and reassignment	400	
(c) Confirmation of the Developer	300	
Total		2,875.92

E

DISBURSEMENT

(a) Stamp Duty on Deed of Receipt & Reassignment	40	
(b) Registration fee to revoke DRR	14	
(c) Letter of Confirmation to be paid to the Developer	50	
(d) Courier Charges	50	
(e) Xerox Costs/Telex/Telephone Charges	60	
(f) Travelling expenses	150	
(g) Miscellaneous	50	
(h) 5% Government Tax	144	558
		3,433.92

F

G

H

RINGGIT MALAYSIA THREE THOUSAND FOUR HUNDRED AND THIRTY THREE AND CENTS NINETY TWO ONLY

sgd

AZIZ ZAKARIA SHAIFUL & WAN

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A [23] As can be seen, the bill is more than just for the sale and purchase agreement. The second item of the 'Legal Fees' states '(b) deed of receipt and reassignment' of RM400. There is nothing wrong is charging RM400 per se for the deed of receipt and reassignment for the Fourth Schedule to the Solicitors' Remuneration Order 2005 provides as follows:

B Deed of Reassignment

First property RM300

C If the Deed of Reassignment includes a Revocation of power of attorney, an additional fee of RM100 shall be payable to the solicitor.

D [24] As the deed of reassignment here involved a revocation of a power of attorney, the solicitors concerned have charged RM400. There was also the ancillary disbursements of RM40 for the stamp duty of RM40 for the stamping of the deed of receipt and reassignment and a further RM14 being the registration fee for revoking the power of attorney.

E [25] However on 13 May 2009 the same solicitors had once again prepared a separate bill for the deed of receipt and reassignment for each of the unit of condominium. The bills each dated 13 May 2009 are marked collectively as exh MY 15 and they appear at pp 151–224 of encl 12. A typical bill is reproduced below:

AZIZ ZAKARIA SHAIFUL & WAN

F Advocates & Solicitors

No. 37, Tingkat 1

Jalan Medan Tuanku

G 50300 Kuala Lumpur

Tel: 03-26944500

Fax: 03-26980604

Email: azsw@tm.net.my

H BANK PERUSAHAAN KECIL & SEDERHANA
MALAYSIA BERHAD

Menara SME Bank

P.O. Box 12352

I 50774 Kuala Lumpur

Date: 13/05/2009

Ref:XXX

Invoice No:

Description	RM	RM	A
RE: Deed of Receipt and Reassignment			
Purchase of Condominium known as XXXX, Block 9, Lanai Gurney Heights Condominium, No 1, Jalan Padang Tembak, Off Jalan Bukit Keramat, 50450 Kuala Lumpur			B
Towards our Professional Charges for services rendered including taking down instructions, liaising with you etc., drafting preparing, attesting and attending to the stamping, registration, filing and other matter not specifically mentioned herein of the following matters:			
LEGAL FEES			C
Deed of Receipt and Reassignment			
	400	400	
DISBURSEMENT			
1) Stamping on Deed of Receipt and Reassignment & copies.	40		D
2) Registration Fees	35		
3) Xerox Costs/Telex/Telephone Charges	45		
4) Travelling Expenses	120		
5) Courier Services Charge	65		
6) Miscellaneous	50		E
7) 5% Government Tax	20		
Ringgit Malaysia Seven Hundred And Seventy Five Only		375	
		775	

[26] As can be seen, the caption reads 'deed of receipt and reassignment' with the unit number stated in it. There is the fee of RM400 charged for 'Legal Fees' for 'deed of receipt and reassignment'. On top of that there is 'disbursement' item '(1) Stamping on deed of receipt and reassignment & copies' and item '(2) Registration Fees' of RM40 and RM35 respectively. Learned counsel for the defendant Mr K Goik had no explanation except to say that the billing was done direct to the plaintiff and the defendant was not aware of it. I cannot accept that explanation as all the bills were carbon copied to the defendant and the defendant needed only to take a look at it to know that there had been billing for the same items in the sale and purchase bills earlier reverted to and reproduced above. The defendant could have and indeed should have alerted the plaintiff to the fact of double-billing and to inform the plaintiff that the defendant will be paying the fees and disbursements as the defendant had earlier been billed for it.

[27] Instead the defendant kept the plaintiff in the dark about the previous billing. Indeed had the plaintiff known about the previous billings for the same items, the plaintiff would not have paid at all. I had no doubt that the plaintiff

A had paid this sum of RM20,925 vide CIMB cheque No 099694 in their letter of 12 August 2009 to the said solicitors AZSW at p 224 of encl 12.

[28] Learned counsel Mr K Goik submitted that if the plaintiff had overpaid the said solicitors, then it is for the plaintiff to claim back from the said solicitors as the defendant was not privy to the said transaction between the plaintiff and the said solicitors. I cannot accept that contention as here the defendant had paid the said solicitors under an earlier billing and seeing that their client the plaintiff had been billed again for the same items, the defendant has a duty of care to at least alert the plaintiff not to pay again or that the plaintiff ought to leave it to him as the R & M to handle the matter of payment of the solicitors' bill. This would be consistent with the fact that since the appointment of the solicitors was by the defendant, the defendant should take responsibility for all unauthorised deduction of fees and disbursements. In any event the said solicitors are not a party to these proceedings. This problem could have been avoided by the defendant if he had kept the plaintiff posted and obtained the plaintiffs consent before making those payments out to the said solicitors concerned. The amount double-billed consisted of RM400 (fees for reassignment) plus RM40 (stamp duty for reassignment) plus RM14 (registration fee for revoking power of attorney) and multiplying the total sum of RM454 by 27 units giving a total sum of RM12,258 being the over-billed and hence the over-paid amount.

[29] As this exercise of taxation is meant to resolve fully and finally the issue of outstanding fees and payments between the plaintiff and the defendant, justice of the case would be served by deducting the sum of RM12,258 from the sum of RM90,712.81 being the legal fees and disbursements paid by the defendant for the sale and purchase (S & P) and the deed of receipt and reassignment (DRR) of the 27 units of condominium yielding the sum of RM78,454.81. The amount of RM 12,258 being the amount overpaid is to be refunded by the defendant to the plaintiff and shall be taken into consideration in the overall calculation as to the amount outstanding from the defendant to the plaintiff.

H *Issue 3: Whether the legal fees of AZSW for RM41,000 for the rendering of legal opinion is reasonable in the circumstances of the case and if not, the amount that should be paid after taxation by the court*

[30] There was no prior agreement on fees for legal opinion to be rendered by the said solicitors to the defendant. It would be prudent and indeed professional to procure a quotation of fees from the solicitors concerned before going ahead to engage them professionally unless the fees for the task involved is governed by the scale fees for non-contentious work that is set out in the Solicitors' Remuneration Order 2005. In the absence of that, an R & M pays

out to his detriment unless he had asked for the solicitors' fees to be taxed first under s 126 of the Legal Profession Act 1976. One way to avoid the process of taxation is to get the plaintiffs concurrence on the fees before the R & M pays out the solicitors' fees.

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[31] Here the bill rendered by the said solicitors AZSW is not just for the legal opinion rendered but also for a host of other services in relation to a sale by an R & M. One would have thought that that would come under the scale fees for the conveyancing transaction for the sale of the 28 units of condominium that the same solicitors have billed and indeed over-billed as we saw just now. The scope of the service provided under the scale fees in the First Schedule to the Solicitors' Remuneration Order 2005 includes the following as set out in r 7 to the Rules under the First Schedule:

B

C

The remuneration specified in this Schedule shall be inclusive of all normal and necessary attendances up to the completion of the transaction, including the drawing up of a sale and purchase agreement and the preparation and registration of the instrument of transfer or the deed of assignment where no individual document of title or strata title has been issued.

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[32] There is no suggestion that the sale and purchase agreement for the 28 units of condominium is different in material particulars one from the other. Other than the parcel number, the purchase price, the floor area and the floor plan, all the other clauses are the same for all the units. I have highlighted in bold below the items in the bill for work done which under r 7 to the Rules under the First Schedule, had already been covered under the scale fees charged which together with disbursements had amounted to RM90,712.81 which amount the defendant had paid in full to the said solicitors.

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AZIZ ZAKARIA SHAFUL & WAN

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Advocates and Solicitors

No. 37, 1st Floor,

Jalan Medan Tuanku

50300 Kuala Lumpur

H

Tel: 03-26944500

Fax: 03-26980604

Your ref:

I

Our ref: AZSW/004/08/sme@s&p

Date: 10 March 2008

Invoices No: 0439/08

Delta Odyssey Sdn Bhd

- A** (Receiver & Manager Appointed)
c/o Messrs Sha, Tan & Co
Box #289, Lot 4.122-4.125
4th Floor, Wisma Central
- B** Jalan Ampang 50450
Kuala Lumpur
- Attn. Mr. Steven Kang Teng Hong
- C** -----

Re: DELTA ODYSSEY SDN BHD (Receiver & Manager Appointed)

- D** Fee RM
- E** To our professional fee and charges in taking down your instructions, attending Meetings with Bank Perusahaan Kecil & Sederhana Malaysia Berhad on your Appointment as the Receiver and Manager of Delta Odyssey Sdn Bhd, *scrutinising the legal security documents of Delta Odyssey Sdn Bhd namely the Debenture dated 29 December 2005 between Delta Odyssey Sdn Bhd and Bank Perusahaan Kecil & Sederhana Malaysia Berhad, the First Party Deed of Assignment Dated 29 December 2005 between Delta Odyssey Sdn Bhd and Bank Perusahaan Kecil & Sederhana Malaysia Berhad, the*
- F** *Guarantee Agreement by the guarantors, All the 30 sets of the Sale & Purchase Agreements dated 8 November 2005 Between Delta Odyssey Sdn Bhd and Mampu Jaya Sdn Bhd and Datuk Bandar Kuala Lumpur and all the 30 sets of the Deed of Mutual Covenants dated 8 November 2005 between Delta Odyssey Sdn Bhd and Mampu Jaya Sdn Bhd and Datuk Bandar Kuala Lumpur, perusing and scrutinising form 59 on your appointment as the Receiver and Manager of Delta Odyssey Sdn Bhd, perusing and scrutinising the Deed of Appointment and Indemnity by Bank Perusahaan Kecil & Sederhana Malaysia Berhad appointing you as the Receiver and Manager of Delta Odyssey Sdn Bhd, rendering legal advisory to your officers on all matter in connection of execution of the receivership assignment, advising and assisting your officers in the planning for the execution of the receivership assignment and on the initial steps and procedures in executing the receivership assignment, attending meetings together with your officers with representatives of Delta Odyssey Sdn Bhd, attending several meetings with Bank Perusahaan Kecil & Sederhana Malaysia Berhad on the progress and reports of the receivership assignment, assisting your officers and scrutinising the advertisement of the tender of the properties in the respective*
- G**
- H**
- I**

newspapers, assisting your officers and scrutinising the tender documents on the Properties, attending meeting together with your officers with Bank Perusahaan Kecil & Sederhana Malaysia Berhad on the tender from the purchaser and discussing the possibility of increasing tender price and the increase thereof, assisting your officers on the meeting with the purchaser and their solicitors for the increase of the tender price, advising your officers on the legal aspect of accepting the tender from the successful purchaser Kanawagi all Seperumaniam, liaising with the purchaser's solicitors Messrs Khana & Co, issuing letters to them, and generally giving legal advice to your officers on the matters and attending to other matters not specifically mentioned herein but necessary to carry out the assignment.

40,000 40,000

Disbursement

Transportation charges, Photostatting charges,

Telephone charges, courier charges and

Miscellaneous charges

1,000

1,000

1,000

41,000

RINGGIT MALAYSIA FORTY ONE THOUSAND (RM41,000) Only

Sgd

Messrs Aziz Zakaria Shaiful & Wan

[33] I am not unaware that under para 4 of the Solicitors' Remuneration Order 2005 there is provision for additional remuneration for what is called 'special exertion' as follows:

4 In respect of any non-contentious business which is required to be carried through by special exertion in an exceptionally short space of time, a solicitor may charge additional remuneration for the special exertion according to the circumstances.

[34] Here in this instance there is no indication in the lump-sum bill reproduced above of any special exertion on an exceptionally urgent basis. In the absence of that the scale fees as charged would more than suffice seeing that these are falling into the category of what one would call 'bulk work'; one sale and purchase agreement fitting all the 28 units of condominium and fixing all anticipated problems and firming up all terms and conditions.

[35] The items not in bold above in the bill are the items that should rightly be covered by the bill for legal opinion and attendances. I had scrutinised the legal opinion given by the said solicitors to the defendant that appeared in

- A** pp 55–58 in exh STF 5 in the affidavit of the defendant dated 15 June 2012. They relate to the wild allegations by the developer of the Condominium Mampu Jaya Sdn Bhd ('MJSB') that the sale of the 28 units belonging to Delta Odyssey now in receivership is for a price way below market value and that such an action by the defendant as R & M would adversely affect the future prices of
- B** all the properties in the 613 units development. It is only too obvious that the developer had no basis for complaint much less a locus to bring any action against the defendant. It is a free market and the persons having even remotely only some interest to challenge the sale price would be the contributories and the creditors and none of them had complained as the sale was based on an
- C** open tender exercise and sale was to the highest bidder coupled with a valuation report for the fixing of a reserved price. Some cases on the difference between 'legal interest' and 'commercial interest' were cited to justify the opinion that the allegations of the developer are baseless and that the developer lacks sufficient locus to sue.

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[36] There are no novel points of law involved and I bear in mind the factors set out in the Sixth Schedule in the Rules made thereunder as reproduced below:

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1. The remuneration of a solicitor in respect of non-contentious work for which no provision is made by means of a scale or fixed fee shall be such sum as is fair and reasonable having regard to all the circumstances of the case, and in particular the following circumstances:

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- (a) the importance of the matter to the client;
- (b) the skill, labour, specialised knowledge and responsibility involved on the part of the solicitor;
- (c) the complexity of the matter or the difficulty or novelty of the question raised;

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- (d) where money or property is involved, the amount or value thereof;
- (e) the time expended by the solicitor;
- (f) the number and importance of the documents prepared or perused by the solicitor;

H

- (g) the place and the circumstances under which the services or business or any part thereof are rendered or transacted.

I

[37] The bill as it stood lacks details as to the time spent in the meetings and the particulars of dates of meeting and in the absence of a prior agreement on fees between the defendant and his client the plaintiff on the one hand and between the defendant and the solicitors on the other hand, this court by consent of the plaintiff and the defendant, is entitled to form its own opinion

on what is reasonable based on the factors enumerated above. Based on all the above factors, I had allowed RM10,000 as fees of the said solicitors and a further disbursement of RM1,000.

A

[38] The defendant's learned counsel had justified deduction at source from the proceeds of sale the defendant's sales commission of 5% of the sale price and the legal fees and disbursements billed by the said solicitors. His justification is based on section 9.05 under 'Application of Proceeds' in the debenture at p 43 of encl 12 which reads as follows:

B

The net profits of carrying on the business of the Borrower and/or the net proceeds of any sales shall be applied by the Bank or the Receiver and or Manager, ... *Firstly, in payment of all costs, charges and expenses of and incidental to the appointment of the Receiver and or Manager...* and the exercise by him ... of all or any of the powers aforesaid including the *reasonable remuneration of the Receiver and or Manager ...* (Emphasis added.).

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[39] I do not think for a moment that anyone is disputing the priority of claims of the R & M as set out above. What is being disputed is the quantum of fees before the priority of claims. Otherwise in the absence of any prior agreement on fees of the R & M and that of the solicitors that he engaged, the fees as unilaterally decided by the R & M or its solicitors would automatically prevail irrespective of its amount and whether it be excessively exorbitant or otherwise! Surely that cannot be the position of the law and it has not been. Indeed the words used in section 9.05 of the debenture refer to deduction of 'reasonable remuneration of the receiver and or manager'. Here not only was there no prior agreement on the fees whether it be that of the R & M or that of the solicitors that he engaged, there was no informing the plaintiff of the payments that was made before they were made, let alone getting the concurrence or consent of the plaintiff.

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PRONOUNCEMENT

[40] Based on the answers given to the three issues raised and the findings on what were reasonable sums that the R & M or its agent the said solicitors were entitled to charge after taxation, the final calculation taken into consideration the other undisputed items and sums are set out below:

H

a) R & M FEES AND COST INCURRED	
PARTICULARS	CALCULATION (RM)
Retainer fees (7,000 x 6 months)	42,000

I

A	Sales commission for 28 units	201,924 (Calculation is based on rate of 3% of the sales proceeds ie RM6,730,800.00. (6,730,800 x 3% = 201,924).)
	Tax (5%)	10,096.20 (Tax 5% on RM201,924 = RM10,096.20.)
B	Disbursement	650
	- Travelling	400
	- Printing & Stationery	350
	- Telephone & fax	4,491
C	- Advertisement	9,756
	- Assessment	5,250
	- Quit Rent	
	(+) Valuation Fees	11,300
D	(+) Legal Fees of Messrs Aziz Zakaria	78,454.81 (RM400 (deed of receipt & reassignment) + RM40 (stamping on deed of R&R) + RM14 (registration) = RM454 x 27 units of property = RM12,258. (A comparison btw page 153 and p 237 of encl 12). Thus RM90,712.81 - RM12,258 = RM78,454.81)
E	(+) Legal Fees of Messrs Aziz Zakaria	11,000 (RM11,000 for bills at pp 264–267 of encl 12.)
	TOTAL FEES AND COST EXPENSES	375,672.91
F	b) TOTAL INCOME AND EXPENSES OF R & M	
	PARTICULARS CALCULATION (RM)	PARTICULARS CALCULATION (RM)
	Sales of 27 units — Mr Kanawagi	6,380,800
G	Sales of 1 unit — Mr Timothy Ayling	350,000
	Total Sales	6,730,800
	(-) Payment received from R & M	
	- Proceed received from Messrs Aziz Zakaria	5,662,014.24
H	- Proceed received from R & M (first payment)	380,000
	- Proceed received from R & M (second payment)	310,000
	(-) Fees and cost incurred	375,672.91
I	TOTAL	3,112.85
	(+) Deposit forfeited from Dasar Kurnia S/B sales	65,000
	(+) Rental proceeds	20,000
	Total proceeds to be returned by R & M	88,112.85

[41] Therefore I ordered the defendant as R & M to pay to the plaintiff the sum of RM88,112.85 in full and final settlement of all outstanding accounts with respect to his appointment by the plaintiff as the R & M of Delta Odyssey.

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[42] I also granted interest at 4%pa on the said sum from date of judgment to realisation.

B

[43] I awarded costs of RM8,000 to be paid by the defendant to the plaintiff.

POSTSCRIPT

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[44] All professionals would readily testify to the fact that when it comes to payments of their professional fees, disagreement on the quantum billed and payable is always a sore point. There should be no reticence about stating one's fees upfront at the outset. In as much as a labourer deserves his wages, so too a professional his fees. This sorry state of affairs can best be avoided by seeking clients' prior and proper agreement on fees before proceeding with the work. Indeed professional fee is something very subjective unless there is a prescribed scale fee. The client's willingness to pay is dependent on a host of factors chief of which would be the level of expertise and experience of the professional, the exacting nature of the tasks, the risks involved and the results achieved and for others the level of professional indemnity coverage just in case the professional is negligent. If there is no such prior agreement then at the point before deducting at source or payment out as the case may be, to seek clients' concurrence, failing which to go for taxation. Deduction at source without prior agreement on the fees to be deducted would always be perceived by clients as being unreasonable and worse still, high-handed and worst still, unethical.

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Order accordingly.

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Reported by Afiq Mohamad Noor

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